

undertaking which was repeated on his behalf by Counsel at the hearing.

The general principles upon which the Courts act in appointing an interim receiver have been clearly laid down in the case of *Setapak Tin Syndicate Limited & Anor. v. Choo Kim Peng*⁽¹⁾ where it was held that before an interim receiver will be appointed the Court must be satisfied:—

- (i) that the plaintiff has established a good *prima facie* claim to title, and also
- (ii) that the property is in jeopardy, or
- (iii) at the very least that the party who makes the application will be in a worse situation if the appointment of a receiver is delayed.

On the basis of the material before me I am satisfied that the plaintiff has established at least a *prima facie* claim to title. Whether his title rests upon his being a member of a joint Hindu family or upon his being a partner is a matter which I need not go into at this stage of the proceedings, though it seems to me that the claim on the basis of partnership is the stronger by reason of the admissions made by the defendant in the Indian proceedings.

Dealing with this matter, therefore, from the position which seems most favourable to the plaintiff, namely that of partnership, I must consider whether or not he has made out a sufficient case for the appointment of an interim receiver. Whilst it is true that in partnership cases the Court will appoint a receiver if the defendant wrongfully excludes his co-partner from the management of the partnership affairs (*Wilson v. Greenwood*⁽²⁾), yet the Court, as a rule, declines to appoint a receiver in cases where a partnership is alleged on one side and denied on the other until that issue has been determined. (*Peacock v. Peacock*⁽³⁾; *Tucker v. Prior*⁽⁴⁾ and cases cited in note (p) on p. 636 of *Lindley on Partnership*, 10th Edn.). In this suit both the partnership and the claim based upon the properties being joint family properties are disputed and we are thrown back upon the general principles to which I have referred above.

Assuming that a good *prima facie* claim to title has been made out it remains for the plaintiff to satisfy me, either that the property is in jeopardy, or, at the very least, that he will be in a worse position if the appointment of an interim receiver is delayed. In view of the caveats that have been lodged and the undertaking which the defendant is prepared to give, it is a little difficult to see in what respect the properties can now be said to be in jeopardy. It is usually easier for a party in cases of this kind to obtain an injunction than to obtain the appointment of a receiver. But where an injunction is sought, if the Court feels that it can, by imposing terms on the defendant, secure the plaintiff, in the event of the legal right being determined

in his favour, against damage from what may be done by the defendant in the meantime, and the defendant is willing to accede to the terms made by the Court an injunction will not issue. (See *Kerr on Injunctions*, 6th Edn. p. 26 and cases there cited in note (b)).

I am of opinion that an undertaking to the Court by the defendant not to deal with or dispose of any of the assets in question in this suit will secure the plaintiff's position until the trial of the issues in the suit and I am, therefore, of the opinion that this is not a case in which an injunction would be granted. Still less is it a case where the defendant, who is in possession, should be ousted from that possession by the appointment of a receiver before the plaintiff has finally established his right.

Accordingly, upon the defendant giving an undertaking on the terms indicated above there will be no order on this motion. If the parties are unable to agree upon the wording of the undertaking to be given its exact terms can be settled in Chambers.

Order accordingly.

SIN YONG CHANG v. PUBLIC PROSECUTOR

[A. Cr. J. (Russell J.) February 11, 1949]

[K. L. — Criminal Appeal No. 50 of 1948]

Excise Enactment (Cap. 133), s. 62(c) — Excise Rules 1923 — Keeping dutiable liquor on licensed premises — When duty is payable — Bail pending appeal — Procedure on appeal.

This was an appeal against the conviction of the appellant on a charge of knowingly keeping on licensed premises intoxicating liquor on which excise duty had not been paid. The liquor, the subject matter of the charge, was at the time of the alleged offence in the manufacturing part of the distillery and one of the grounds of appeal was that the prosecution had not proved that excise duty was payable at the time of the alleged keeping of the liquor.

Held: (1) excise duty on intoxicating liquor manufactured locally in a distillery is payable only on removal from the distillery; (2) on the facts of this case as the liquor was at the time of the alleged offence in the manufacturing part of the distillery, no duty was payable in respect of such liquor at that time and therefore no offence under s. 62(c) of the Excise Enactment had been committed by the appellant.

Where the only punishment inflicted is a fine and the fine is paid an appellant ought not to be called upon to furnish bail pending appeal.

CRIMINAL APPEAL from District Judge.

E. D. Shearn for the appellant.

M. Suffian (D. P. P.) for the respondent.

Russell J. : — The appellant was charged before the District Judge, Selangor, with the following offence:—

That you, Sin Yong Chang, on or about 30th October 1948 at 12.30 p.m. did knowingly keep on the licensed premises of the Tai Kwang Distillery, Setapak, intoxicating liquor to wit 604 gallons contained in 8 jars on which the Excise duty leviable by law, namely \$1,374.83 cts.

has not been proved to have been paid, an offence under s. 62(c) Cap. 133 and punishable under the same section.

The evidence for the prosecution, concerning, which there was little dispute, established that at about noon on the 30th of October, 1948, a number of Customs officers went to the distillery and there found eight jars containing sixty-and-a-quarter gallons of samsu. These eight jars which were exhibits were found concealed in various ways in the manufacturing part of the distillery and not in the store. It was the usual practice whenever distillation took place for a senior Customs officer to take certain tests and record certain particulars of the days' distillation and to see that the liquor distilled on that day was placed in the store on the same day. This store was locked by two locks, the Customs officer keeping the key of one lock and the key of the other lock being kept by the kepala. The appellant, an employee in the distillery, was responsible for drawing off the distilled liquor and he admitted that he concealed the eight jars of samsu in the manufacturing part of the distillery.

His explanation was that on a number of occasions his employer had complained to him of deficiencies in the quantity of liquor obtained from distillations. He stated that his employer expected a yield of from 50 to 60 gallons from each distillation and that on occasions the yield had been less. He therefore from time to time unknown to his employer set aside the liquor, found concealed, for the purpose of making good any subsequent deficiencies.

The learned District Judge did not accept this explanation and stated in his grounds of judgment that it was quite clear that the appellant intended to evade the provisions of Rule 9 of the Excise Rules, 1923 which states that intoxicating liquor after distillation must be stored in the store-room prepared and shall not be removed therefrom until the excise duty leviable thereon has been paid.

These rules were made by the Chief Secretary under the Excise Enactment, 1923, and in my opinion would appear to be in force at the present time by virtue of sub-sections (1) & (3) of section 2 of the Statute Law Revision (Chief Secretary's Powers) Enactment, 1937 which Enactment was brought into force by Gazette Notification 3623 dated 27th July, 1937 issued under section 3 of the same Enactment. This Enactment substituted the Commissioner of Customs as the person empowered to make regulations under sections 16 and 25 of the Excise Enactment and substituted the word "regulations" for the word "rules." In October, 1939, sub-section (1) of section 3 of the Excise (Amendment) Enactment, 1939 substituted the Comptroller of Customs for the Commissioner of Customs as the person empowered to make regulations.

The learned District Judge thereupon convicted the appellant and sentenced him to a fine of \$8,250

and in default of payment to twelve months' rigorous imprisonment.

The appeal was argued under three main heads. The first was that where a charge has been laid under section 62(c) of knowingly harbouring, keeping or concealing intoxicating liquor it is incumbent upon the prosecution to prove not merely that excise duty would be payable on the liquor at some future time but that excise duty was payable at the time of or before the time of the harbouring, keeping or concealing. I hold that this contention is correct and the question then arises as to when excise duty on distilled intoxicating liquor is payable.

The learned Deputy Public Prosecutor argued that this duty is payable on manufacture and in support of his argument referred me to Gazette Notification No. 664 of 1941. In my view this notification simply fixed the rate of excise duty payable on locally manufactured intoxicating liquor. As Mr. Shearn, who appeared for the appellant, pointed out, the learned District Judge did not find that any excise duty was payable in respect of the liquor found concealed and I agree with Mr. Shearn that the effect of Rules 10, 11 and 32 of the Excise Rules, 1923, and of Forms 3 & 4 when read with sections 14 & 22 of the Excise Enactment is to provide that excise duty on intoxicating liquor manufactured locally in a distillery is payable on removal from the distillery.

The liquor, the subject-matter of the charge, was at the time of the alleged offence in the manufacturing part of the distillery and I hold therefore that no duty was payable in respect of such liquor at that time and consequently that no offence under section 62(c) was proved to have been committed by the appellant. In view of this finding it is unnecessary for me to consider the other grounds of appeal put forward on his behalf.

I was not asked, if the appellant was not liable as charged under section 62(c), to consider altering the charge to some other charge either under the Enactment or the regulations made thereunder and I therefore do not do so.

I order the conviction to be quashed.

The Order of the learned District Judge as to the fine pending appeal was that if the fine was deposited bail was to be granted in a sum of \$2,500 and one surety. I do not understand what is meant by depositing a fine. Either a fine is paid or it is not paid. Although the appellant in this case has paid the fine he has only been released on bail. Where the only punishment inflicted is a fine and the fine is paid an appellant ought not to be called upon to furnish bail pending appeal. I order the fine to be repaid to the appellant.

Conviction quashed.

Solicitors: *Shearn; Delamore & Co.*